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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Bay State Contracting Co., Inc.

File: B-242909

Date: May 10, 1991

David J. Hopwood, Esq., Heafitz & Hopwood, for the protester.
Joseph K. Curran for Brite-Lite Electrical Co., Inc., an
interested party.
Herbert F. Kelly, Jr., Esq., Department of the Army, for the
agency.
Karen L. Turner, and John G. Brosnan, Esq., Office of the
General Counsel, GAO, participated in the preparation of this
decision.

DIGEST

Requirement to complete a certificate of procurement integrity imposes substantial legal burdens on the contractor and is properly viewed as a matter of responsiveness which cannot be waived or satisfied after bid opening.

DECISION

Bay State Contracting Co., Inc. protests the rejection of its bid as nonresponsive for failure to include a completed Certificate of Procurement Integrity as required by invitation for bids (IFB) No. DAHA19-91-B-0001, issued by the United States Property and Fiscal Office for Massachusetts, National Guard Bureau.

We deny the protest.

The solicitation, issued December 4, 1990, was for the repair and rehabilitation of hangar building Nos. 192 and 194 at Otis Air National Guard Base, Massachusetts. Amendment 0001 to the solicitation was issued on December 26, incorporating the Requirement for Certificate of Procurement Integrity clause set forth at Federal Acquisition Regulation (FAR) § 52.203-8 as required by FAR § 3.104-10. This clause implements 41 U.S.C.A. § 423(e)(1) (West Supp. 1990), which provides that an agency shall not award a contract unless a bidder or offeror certifies in writing that neither it nor its employees has any information concerning violations or possible violations of the Office of Federal Procurement Policy (OFPP) Act. The amendment stated that two copies of the clause were "to be returned with [the] [b]id," while the clause cautioned

that "failure of an offeror to submit the certificate . . . will render the offeror ineligible for contract award." (Emphasis added.)

After the January 29, 1991, bid opening, the contracting officer determined that Bay State was the apparent low bidder but rejected its bid as nonresponsive for failure to submit the Certificate of Procurement Integrity with its bid.

Bay State argues that it was improper for the agency to reject its bid. The protester characterizes its failure to submit the certification with its bid as "an informality or a minor mistake" which the contracting officer has the discretion to waive. The protester asserts that because the certificate does not affect the price, quality or delivery of the services required under the IFB, the contracting officer should waive the requirement.


We disagree. The certification requirements impose a substantial legal obligation on the contractor which is materially different from those to which firms are otherwise bound and therefore the certification requirement is a material term of the IFB which is properly treated as a matter of responsiveness and cannot be waived or satisfied after bid opening. Mid-East Contractors, Inc., B-242435, Mar. 29, 1991, 91-1 CPD ¶ ____.

The protester further argues that notwithstanding the material nature of the requirement, paragraph (d) of the certification clause, which states that "the offeror may be requested to execute additional certifications at the request of the Government," permits the submission of the certification after bid opening.^{1/}

Paragraph (d), however, clearly refers to the continuing duty of the bidder to supply additional certificates as required by the agency. Paragraph (c)(1) requires the certificate to be initially submitted with the bid as do the instructions in the amendment itself. Paragraph (d) does not modify paragraph (c)(1).

^{1/} The protester also argues that the Requirement for Certification of Procurement Integrity clause incorporated into the solicitation is somehow incompatible with 41 U.S.C.A. § 423. This argument, which concerns a provision in the solicitation which was not raised until after the bid opening, is untimely and will not be considered. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1991).

We conclude that Bay State's bid was properly rejected as nonresponsive and we therefore deny the protest.


James F. Hinchman
General Counsel